



IN THE MATTER OF:

Complainant,

and

**GENERAL BOARD OF PENSION AND
HEALTH BENEFITS OF THE UNITED
METHODIST CHURCH,
Respondent.**

Charge No.: 2000CF1839

EEOC No.: 21BA21361

ALS No.: 11890

RECOMMENDED ORDER AND DECISION

On September 26, 2002, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, John D'Anna. That complaint alleged that Respondent, General Board of Pension and Health Benefits of the United Methodist Church, discriminated against Complainant on the basis of a physical handicap when it discharged him. The complaint further alleged that Respondent unlawfully retaliated against Complainant by discharging him after he opposed unlawful discrimination.

This matter now comes on to be heard on Respondent's Motion for Summary Decision. Complainant has filed a written response to the motion and Respondent has filed a written reply to that response. The matter is ready for decision.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent, General Board of Pension and Health Benefits of the United

Methodist Church, hired Complainant, John D'Anna, on or about September 1, 1999. Complainant's job title was Media Specialist.

2. Complainant's job duties included videotaping and editing productions, arranging equipment maintenance, and overseeing operations involved with Respondent's video productions.

3. All of Respondent's new employees went through a ninety-day probation period. During that period, probationary employees could be discharged without notice if they were unable to meet Respondent's performance standards.

4. Complainant's immediate supervisor was Larry Foreman, Respondent's Director of Communications.

5. In September of 1999, on a trial basis, Foreman approved Complainant's request to shift to flex-time hours for the months of September and October. Complainant explained that he wanted the flex-time hours to shorten his commute.

6. On September 13, 1999, Complainant sent an e-mail message to Foreman. That message contained the following passage:

I need to know if we have an equipment cart or platform truck with which to transport equipment. Last week I sent you a memo in which I requested a deck truck from Global Industrial Equipment but have not received a reply. I bring this up because you indicated last Friday (9/10/99) that you wanted to rent a Betacam SP tape deck and (possibly a monitor if you don't have one) with which to log footage. Because I recently found out that I have a rotator cuff tear in my right shoulder and am on a doctor's lifting restriction, I will need some type of equipment cart (and possibly someone to help load and unload this heavy equipment) if I am to pick up this type of equipment for rental. The restriction is so I don't extend the tear further.

To clarify things, I found out about the rotator cuff tear and the need for possible surgery after accepting my position at the General Board and after leaving my previous employer. I did tell Kay Smith that I did have an accident on my previous job and was going for therapy for my back and shoulder weeks before I was hired at the General Board. In fact, I later mentioned to her (you were on vacation) that my back and side pain may not be due to the kidney stone I reported to you prior to being hired. Because of the range of motion in my arm, doctors told me I probably did not have a torn rotator cuff and the therapy should help me. The news of

a torn rotator cuff was a surprise to me and I notified you of the tear last week when I asked about taking ½ sick day off to get a cortisone shot in my spine on the afternoon of 10/1/99.

7. Foreman authorized the purchase of the truck Complainant requested.

8. On September 20, 1999, Complainant filled out and submitted an absence report. That report indicated that Complainant would need to be off work on October 1, 1999 to receive an epidural injection.

9. On September 30, 1999, Complainant filled out and submitted an absence report that indicated that he would need to be off work for approximately one week for rotator cuff surgery.

10. Complainant returned to work on October 14, 1999 after his rotator cuff surgery. His right arm was in a sling, and he had a medical release which stated that he was not to use his right arm.

11. Complainant was off work from October 21, 1999 through the end of that month. In the space for diagnosis, his doctor's note said "RT Shoulder." The note also stated "off work for epidural and back pain 10/21-10/22 [;] 1 week for shoulder 10/25-10/31."

12. In November, Complainant gave Respondent a doctor's note dated 11/13/99. That note stated that Complainant was not to use his right arm except as a helper to the other arm. The note also stated that Complainant was not to lift his right arm unless his hand was empty.

13. Complainant never gave Foreman any documentation that used the words "spinal stenosis" or "spondylolisthesis."

14. During his tenure with Respondent, Complainant never told Foreman that he suffered from spinal stenosis or spondylolisthesis.

15. On November 5, 1999, Foreman met with Complainant to discuss Foreman's expectations. Foreman told Complainant that he could no longer keep his flex-time hours.

Foreman also told Complainant that he needed to take the initiative and follow through on certain assignments.

16. After the November 5 meeting with Foreman, Complainant spoke with Daryl Anderson. Complainant told Anderson that he thought he might be fired because of his physical conditions.

17. After speaking to Anderson, Complainant spoke to Barbara Isaacs, a chaplain and administrator for Respondent. Complainant told Isaacs that he had had rotator cuff surgery and that the shoulder problem had aggravated an old back injury that required recent injections in his spine.

18. Neither Anderson nor Isaacs told Foreman about Complainant's complaints about his back. Neither Anderson nor Isaacs told Foreman that Complainant was concerned about the possibility of losing his job.

19. On or about November 17, 1999, Respondent discharged Complainant. Foreman made the discharge decision.

20. Foreman made the discharge decision when he did because Complainant's probation period was coming to an end later that month.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant cannot establish a *prima facie* case of handicap discrimination against him.

4. Complainant cannot establish a *prima facie* case of unlawful retaliation against him.

5. There is no genuine issue of material fact in this matter and Respondent is entitled to a recommended order in its favor on both of the claims raised in the complaint.

6. A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

This matter is being considered pursuant to Respondent's Motion for Summary Decision. A summary decision is analogous to a summary judgment in the Circuit Court. ***Cano v. Village of Dolton***, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist. 1993). Such a motion should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. ***Strunin and Marshall Field & Co.***, 8 Ill. HRC Rep. 199 (1983). The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. ***Kolakowski v. Voris***, 76 Ill App. 3d 453, 395 N.E.2d 6 (1st Dist. 1979). The movant's right to a summary decision must be clear and free from doubt. ***Bennett v. Raag***, 103 Ill. App. 3d 321, 431 N.E.2d 48 (2d Dist. 1982).

Respondent, General Board of Pension and Health Benefits of the United Methodist Church, hired Complainant, John D'Anna, on or about September 1, 1999. Complainant's job title was Media Specialist. Complainant's job duties included videotaping and editing productions, arranging equipment maintenance, and overseeing operations involved with Respondent's video productions. His immediate supervisor was Larry Foreman, Respondent's Director of Communications.

All of Respondent's new employees went through a ninety-day probation period. During that period, probationary employees could be discharged without notice if they were unable to meet Respondent's performance standards. Complainant never made it through that probation period. On or about November 17, 1999, he was discharged. The discharge decision was made by Larry Foreman. Foreman made that decision when he did because the probation period was nearing its end.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discriminated against Complainant on the basis of physical handicap. The charge further alleged that Respondent retaliated against Complainant for opposing unlawful discrimination.

Complainant's charge of discrimination alleged two different physical handicaps, a back condition and a torn rotator cuff. The Illinois Department of Human Rights determined that the torn rotator cuff was not a handicap and dismissed the allegations relating to that condition. In addition, the Department dismissed allegations that Respondent failed to accommodate Complainant's conditions and forced him back to work too soon. As a result, the only claims remaining to be decided are claims that Complainant was discharged because of his handicapping back condition and because of unlawful retaliation. The handicap claim will be considered first.

The method of proving a charge of discrimination is well established. First, Complainant must establish a *prima facie* showing of discrimination. If he does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. For Complainant to prevail, he must then prove that Respondent's articulated reason is pretextual. ***Zaderaka v. Human Rights Commission***, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). See also ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 251 (1981).

To prove a *prima facie* case of handicap discrimination, Complainant has to prove three elements. He has to prove 1) that he was handicapped within the meaning of the Act, 2) that Respondent took an adverse action against him related to that handicap, and 3) that his handicap was unrelated to his ability to perform the duties of his job. ***Habinka v. Human Rights Commission***, 192 Ill. App. 3d 343, 548 N.E.2d 702 (1st Dist. 1989); ***Kenall Mfg. Co. v. Illinois Human Rights Commission***, 152 Ill. App. 3d 695, 504 N.E.2d 805 (1st Dist. 1987).

Complainant states that his back disorder is spondylolisthesis and spinal stenosis. He

maintains that those conditions qualify (together or separately) as a handicap under the Act. For purposes of its motion for summary decision, Respondent does not dispute that Complainant's back condition qualified as a handicap. Similarly, there is no dispute that Complainant's physical condition was unrelated to his ability to perform his job. However, Respondent argues that Complainant cannot establish the remaining element of his *prima facie* case because Foreman was unaware of his back condition when he made the discharge decision.

Certainly, Foreman was on notice that Complainant had some physical problems. The record in this case is replete with references to those problems. For example, on September 13, 1999, Complainant sent an e-mail message to Foreman. That message contained the following passage:

I need to know if we have an equipment cart or platform truck with which to transport equipment. Last week I sent you a memo in which I requested a deck truck from Global Industrial Equipment but have not received a reply. I bring this up because you indicated last Friday (9/10/99) that you wanted to rent a Betacam SP tape deck and (possibly a monitor if you don't have one) with which to log footage. Because I recently found out that I have a rotator cuff tear in my right shoulder and am on a doctor's lifting restriction, I will need some type of equipment cart (and possibly someone to help load and unload this heavy equipment) if I am to pick up this type of equipment for rental. The restriction is so I don't extend the tear further.

To clarify things, I found out about the rotator cuff tear and the need for possible surgery after accepting my position at the General Board and after leaving my previous employer. I did tell Kay Smith that I did have an accident on my previous job and was going for therapy for my back and shoulder weeks before I was hired at the General Board. In fact, I later mentioned to her (you were on vacation) that my back and side pain may not be due to the kidney stone I reported to you prior to being hired. Because of the range of motion in my arm, doctors told me I probably did not have a torn rotator cuff and the therapy should help me. The news of a torn rotator cuff was a surprise to me and I notified you of the tear last week when I asked about taking ½ sick day off to get a cortisone shot in my spine on the afternoon of 10/1/99.

That e-mail message illustrates how easy it was for Foreman to get the wrong idea about Complainant's situation. For one thing, it makes it sound as though the rotator cuff tear was Complainant's main physical problem. Moreover, the message

states that Complainant's back pain might not be caused by a kidney stone, which apparently was Complainant's explanation before his hire. In other words, Complainant's shoulder seems to be the main problem and his back condition is not correctly explained.

Other communications from Complainant reinforced Foreman's misperception. On September 20, 1999, Complainant filled out and submitted an absence report. That report indicated that Complainant would need to be off work on October 1, 1999 to receive an epidural injection. There was no indication what condition required that injection. On September 30, 1999, Complainant filled out and submitted an absence report that indicated that he would need to be off work for approximately one week for rotator cuff surgery. Again, there was no indication that Complainant's back was a major problem.

Complainant returned to work on October 14, 1999 after his rotator cuff surgery. His right arm was in a sling, and he had a medical release which stated that he was not to use his right arm. Complainant was off work from October 21, 1999 through the end of that month. In the space for diagnosis, his doctor's note said "RT Shoulder." The note also stated "off work for epidural and back pain 10/21-10/22 [;] 1 week for shoulder 10/25-10/31." In November, Complainant gave Respondent a doctor's note dated 11/13/99. That note stated that Complainant was not to use his right arm except as a helper to the other arm. The note also stated that Complainant was not to lift his right arm unless his hand was empty.

Complainant never gave Foreman any documentation that used the words "spinal stenosis" or "spondylolisthesis." Moreover, he never told Foreman that he suffered from spinal stenosis or spondylolisthesis. The references to back pain were always made in tandem with references to the rotator cuff injury. There was no reason for Foreman to know the extent of Complainant's back condition or to differentiate it from the shoulder condition.

It appears that Complainant explained his back condition in more detail when talking to

some other people who worked for Respondent. He suggests that those people shared that information with Foreman. There is nothing in the record, though, to support that suggestion.

On November 5, 1999, Foreman met with Complainant to discuss Foreman's expectations. Foreman told Complainant that he could no longer keep his flex-time hours that had been approved in September. Foreman also told Complainant that he needed to take the initiative and follow through on certain assignments. After that meeting with Foreman, Complainant spoke with Daryl Anderson. Complainant told Anderson that he thought he might be fired because of his physical conditions. After speaking to Anderson, Complainant spoke to Barbara Isaacs, a chaplain and administrator for Respondent. Complainant told Isaacs that he had had rotator cuff surgery and that the shoulder problem had aggravated an old back injury that required recent injections in his spine.

Obviously, Foreman would have had notice of Complainant's back condition if either Anderson or Isaacs had shared that information with him. However, Respondent has submitted affidavits from Anderson and Isaacs. Both of them deny that any diagnosis of Complainant's back condition was shared with Foreman. Those denials are consistent with Foreman's affidavit. Complainant did not submit any affidavits to counter the allegations in Respondent's affidavits. As a result, Respondent's statements stand unrebutted and must be accepted as true. See *Koukoulomatis v. Disco Wheels*, 127 Ill. App. 3d 95, 468 N.E.2d 477 (1st Dist. 1984).

There is no dispute that Respondent took adverse action against Complainant and that Foreman was the person who decided to take that action. Nonetheless, if Foreman was unaware of Complainant's back condition, that condition cannot have been a factor in the adverse action. Therefore, Complainant cannot establish a *prima facie* case of handicap discrimination and his claim for that discrimination must fail.

Complainant fares no better on his retaliation claim. To establish a *prima facie* case of

retaliation, Complainant would have to prove three elements. He would have to prove 1) that he engaged in a protected activity, 2) that Respondent took an adverse action against him, and 3) that there was a causal nexus between the protected activity and Respondent's adverse action. ***Carter Coal Co. v. Human Rights Commission***, 261 Ill. App. 3d 1, 633 N.E.2d 202 (5th Dist. 1994). Complainant may be able to establish the first two elements, but it is clear that he cannot establish the third.

Complainant maintains that his protected activity was telling Anderson and Isaacs that he feared he would be fired because of his handicap. The problem with that position is that both Anderson and Isaacs denied in their affidavits that they shared with Foreman that aspect of their discussions. As noted above, Complainant's failure to rebut those affidavits means that the affidavits must be accepted as true. Thus, there is no dispute that Foreman was unaware of Complainant's protected activity at the time he made the discharge decision. He could not have retaliated against Complainant for something he was unaware Complainant had done. As a result, there is no genuine issue of material fact on Complainant's retaliation claim and that claim must fail.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact on either of the claims raised in the complaint and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: March 29, 2004